International Paper Company *and* Local 14, United Paperworkers International Union, AFL–CIO and International Brotherhood of Firemen and Oilers, Local 246, AFL–CIO. Case 1–CA–26214

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case presents the issue, inter alia, whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Forrest Flagg for strike-related misconduct.[1] The judge found that the Respondent had a reasonable good-faith belief that Flagg had engaged in misconduct. He further found that the General Counsel had not established that Flagg did not engage in the misconduct. However, the judge found that the act of discharging Flagg for this misconduct was unlawfully disparate when compared to the Respondent's handling of strike-related misconduct by nonstriking employee Thomas Barclay. The Respondent contests this finding.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as discussed below,[3] and to adopt the recommended Order as modified.

We agree with the judge that Flagg engaged in misconduct warranting a denial of reinstatement under the standard of *Clear Pine Mouldings*, 268 NLRB 1044 (1984). For the reasons set forth below, however, we disagree with the judge that nonstriker Barclay engaged in misconduct that was ''at least as serious as, or more serious than,''[4] Flagg's misconduct. Consequently, we reverse the judge and find that the Respondent did not engage in unlawful disparate treatment of Flagg.

The issue of unlawful disparate treatment turns on a comparison of two incidents which occurred during a lengthy strike at the Respondent's Androscoggin papermill in Jay, Maine.

On December 8, 1987, replacement employee Mark Roderick was attempting to drive through the papermill's main gate when pickets, including Flagg, surrounded his car. Roderick stopped his car. Flagg then opened the front passenger door, leaned in, tried to grab Roderick, and said, ''I'll kill you, you bastard.'' Roderick drove away with the door still ajar. He immediately reported the incident to the Respondent's security guard and identified Flagg as his assailant. The Respondent also had a videotape of the incident. As indicated, the Respondent eventually refused to reinstate Flagg because of this misconduct.

On July 30, 1987, striker Charles Fullerton and about 10 others were attending a party at a campsite owned by striker John Luciano. Nonstriker Barclay and his son arrived at the site carrying baseball bats. Barclay complained about being called a scab, having windows broken at his lakeshore camp, and being harassed by a large number of boats which had pulled up in front of his campsite. Luciano warned Barclay against trespassing. Barclay said he was there to clean them all out. He and his son approached with their bats. They were asked to drop the bats and leave, but they did not do so. A struggle ensued as the strikers attempted to take away the bats. Fullerton was struck on the nose by a bat. The resultant wound required stitches. On January 24, 1989, criminal charges against Barclay were conditionally dismissed based on payment of costs to the court and to Fullerton. After investigating the incident, the Respondent warned Barclay that he would be considered for discharge if convicted of the criminal charge or if he repeated such conduct. No further action was taken.

The judge found that Flagg's misconduct was not more serious than that of Barclay, ''who wielded a weapon while threatening violence.'' Although it is a close question, we disagree.[5] Flagg's death threat and attempted physical assault of Roderick, who was surrounded by strikers, were totally unprovoked. On the other hand, the physical threats conveyed by the Barclays' intrusion on the strikers' party, the brandishing of baseball bats, and the declaration of an intent to ''clean [the strikers] all out'' must be viewed in the context of the recent incidents of striker harassment,

[1] On September 9, 1991, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent, the General Counsel, and the Charging Parties each filed exceptions and a supporting brief. The General Counsel and the Charging Parties each filed an answering brief to the Respondent's exceptions. The Respondent filed a reply memorandum to exceptions from the General Counsel and the Charging Parties. The Charging Parties filed a response to the Respondent's reply memorandum.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent and the Charging Parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In affirming the judge's rejection of the Respondent's 10(b) defense, we find no need to rely on his finding of equivocation by the Respondent as to the finality of disciplinary actions described in October 18 and November 1, 1988 lists given to the Unions. Member Devaney does not rely in this context on *Oregon Steel Mills*, 300 NLRB 817 (1990), cited by the judge, in which Member Devaney found it unnecessary to reach the 10(b) issue.

[4] *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988).

[5] We agree with the judge that the misconduct of nonstriker York, which was not shown to have been intentional, was not comparable in severity to Flagg's misconduct. Furthermore, in affirming the judge's finding that the Respondent violated Sec. 8(a)(3) by disparate treatment of striker Lawrence Bilodeau, we do not rely on the judge's comparison of Bilodeau's misconduct to York's misconduct.

threats, and property damage at the Barclay campsite.[6] Furthermore, the evidence available to the Respondent and the record in this hearing indicate that the Barclays did not initiate the actual physical struggle with strikers or intentionally injure Fullerton. Both the struggle and the injury resulted from the strikers' attempt to take away the bats. Although the foregoing factors do not excuse Barclay's conduct in this confrontation, we find that the General Counsel has not met his burden of establishing that Barclay's misconduct was the same as or worse than Flagg's unprovoked misconduct.[7] Accordingly, we find that the Respondent's refusal to reinstate Flagg, while not discharging Barclay, did not constitute unlawful disparate treatment. We conclude that the Respondent's discharge of Flagg did not violate Section 8(a)(3).[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Paper Company, Jay, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

''(a) Offer Lawrence Bilodeau immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

''(b) Remove from its files any reference to the discharge of Lawrence Bilodeau and notify him in writing this has been done and that evidence of this unlawful action will not be used as a basis for future personnel actions against him.''

2. Substitute the attached notice for that of the administrative law judge.

[6] No one has denied Barclay's accusations.

[7] We note, moreover, that the Respondent did not simply excuse Barclay's misconduct. In fact, he was told that had he been prosecuted and convicted, he would have been considered for discharge. In any event, he was warned that a repetition of such misconduct could result in discharge. Therefore, in comparing the situation of Flagg to that of Barclay, the disparity in disciplinary action reasonably approximated the disparity in severity of misconduct.

Member Devaney does not rely on the reasoning in this footnote.

[8] We shall modify relevant provisions of the judge's recommended Order and substitute a new notice reflecting our reversal of the judge on this issue.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union or other concerted activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Lawrence Bilodeau immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered resulting from our discrimination against him, less any interim earnings, plus interest.

WE WILL notify Lawrence Bilodeau that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

INTERNATIONAL PAPER COMPANY

Michael T. Fitzsimmons, Esq. and *Joseph F. Griffin, Esq.*, for the General Counsel.
Jane B. Jacobs, Esq. and *Nancy B. Levine, Esq.*, for International Paper Company.
Jeffrey N. Young, Esq., for the Charging Unions.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This case was litigated before me in Portland, Maine, on March 11–15, 1991, and at Boston, Massachusetts, on April 9, 1991, pursuant to charges filed on March 14, 1989, and served on March 17, 1989, and complaint issued on September 13, 1989, alleging the discharge of Lawrence Bilodeau, Lawrence Chicoine Sr., Forrest Flagg, Thomas Hamlin, and Ar-

thur Storer violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

International Paper Company (Respondent) denies the discharge of the five employees violated the Act, contends the discharges of all but Bilodeau are time barred, and asserts all five were discharged for unprotected misconduct during a strike.

On the entire record,[1] and after considering the very able posttrial briefs of the parties and the comparative testimonial demeanor of the witnesses before me, I make the following

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find that at all times material, Respondent, a corporation with an office and place of business in Jay, Maine, has been engaged in the operation of a papermill, and during the calendar year ending December 31, 1988, in the course and conduct of these business operations, purchased and received at its Jay, Maine facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Maine. Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Local 14, United Paperworkers International Union, AFL–CIO and International Brotherhood of Firemen and Oilers, Local 246, AFL–CIO (the Unions) are now and have been labor organizations within the meaning of Section 2(5) of the Act at all times material to this proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Context*[2]

The complaint alleges, Respondent admits, and I find that from on or about June 16, 1987, to on or about October 9, 1988, employees of Respondent at Jay, Maine, and represented by the Unions, concertedly ceased work and engaged in a strike. Respondent further admits, and I find, that on or about October 9, 1988, the Unions, on behalf of the striking employees, made an unconditional offer to return to work to their former positions of employment. The complaint alleges and Respondent admits Bilodeau, Chicoine, Flagg, Hamlin, and Storer were discharged. The General Counsel contends all five were denied employment after October 9, 1988. Respondent argues that all but Bilodeau were discharged more than 6 months prior to the filing of the charges in this proceeding, and Section 10(b) of the Act therefore requires a dismissal of the complaint as it relates to them.

B. *The 10(b) Issue*

Section 10(b) provides, in relevant part, that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.'' If, as the General Counsel alleges, the discharges took place in October 1988, the filing of the charge in this case in March 1989 was clearly timely. On the other hand, if Respondent made a final decision to discharge all but Bilodeau and unequivocally communicated that decision to them more than 6 months prior to the filing of the complaint, the allegations that Chicoine, Flagg, Hamlin, and Storer were unlawfully terminated must be dismissed.[3]

Respondent relies upon communications between itself and the Unions in April 1988 during meetings convened in Louisville, Kentucky, convened for the purpose of negotiating a settlement of the labor dispute. The General Counsel and the Unions' counsel object to the receipt of evidence that Respondent during these meetings advised the Unions certain employees, including the four here in question, were or would be discharged for misconduct. The objections, which were overruled, were based on the premise the Louisville meetings were in the nature of settlement discussions. I agree the parties gathered together for the purpose of resolving the issues leading to the strike and, by so doing, cause the strike to be terminated. There is not a shred of evidence however that there was any effort to compromise concerning who would or might be disciplined. The testimony merely shows Respondent made certain declarations concerning how it was dealing with striker misconduct, and proffered documents in support of these declarations. To the extent the objections to receipt of evidence of Respondent's conduct during the Louisville meetings concerning the discipline of strikers are still maintained, they are again overruled.

There were two levels of meetings at Louisville. At one level International Union senior officers met with senior officials of Respondent. Local Union officers met with lower-level management representatives. Testimony concerning what was said about discharging strikers at the senior level meeting was adduced from James Gilliland, Respondent's corporate director of labor relations, Wayne E. Glenn, International president of the Paperworkers, and Lynn Agee, general counsel for the Paperworkers' International Union. According to Gilliland, he was requested by Glenn to provide Glenn with the number and names of employees to be discharged for misconduct, and he therefore gave the Union (i.e., Paperworkers) such a list on April 2, 1988, when Glenn was present. This document contains information concerning all of Respondent's locations involved in the strike. The list for the Jay, Maine location is headed ''Strike Misconduct'' with subheadings ''Discharge for Strike Misconduct'' and ''Discipline for Strike Misconduct.'' Chicoine, Flagg, Hamlin, and Storer are named, with others, under the ''Discharge'' heading. The document does not state whether the discharges had taken place, would take place, might take place, or anything else explanatory of the listing. Gilliland

[1] Respondent's motion to correct transcript is granted.

[2] The conclusions of fact herein are based on stipulations by the parties, the credible portions of testimony of the participants, and the documentary evidence received. In those instances where conflicts in testimony arose I have considered the reasonable probabilities, the convincing character of the testimony, and comparative demeanor of opposing witnesses. Testimony that might appear to conflict with my findings of fact has been examined and rejected as less credible than that on which I have relied. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161 (1966). I have credited parts of witnesses' testimony while not crediting other parts. This is neither unusual or improper. *NLRB. v. Universal Camera Corp.*, 179 F.2d (2d Cir. 1950), vacated on other grounds 340 U.S. 474 (1951).

[3] *Postal Service Marina Center*, 271 NLRB 397 (1984); *Manitowoc Engineering Co.*, 291 NLRB 915, 920 (1988); *Oregon Steel Mills*, 300 NLRB 817 (1990).

testified it is a list of names of people who had been disciplined or were under investigation for discipline for strike misconduct. Gilliland testified on two occasions. On March 1991, he testified, ''We described this as a tentative list based on the information we had at that time,'' but then testified the Union was told those listed under the ''Discharge'' heading had been discharged. He also said he had no idea when the discharge took place, but testified that employees normally are notified orally or in writing that they have been discharged. The alleged discriminatees received no direct notice of discharge from Respondent. Recalled as a witness on April 9, 1991, he testified those listed as discharge had been discharged when the list was furnished and those named under ''Discipline'' were to be disciplined if they came back to work. Glenn denies the list was given to him or that he ever saw it before the day of the trial, but does not know if anyone else from the Union received it. Agee says he never saw the list before the trial day, and no strikers were identified in any meeting he attended. He does not know if any International officer received the list. It is not clear whether Agee was even at the April 2, 1988 meeting. On the whole, I found Gilliland's testimony convincing to the extent I conclude that he did, on April 2, 1988, provide the Paperworkers International Union with the aforementioned list. It is quite possible that he gave it to someone at the meeting other than Glenn and that Agee was not present, but whether these latter possibilities be accurate is of no consequence because I find the Union did receive the list on April 2, 1988. I further find, however, that Gilliland's testimony he told the Union those listed under discharge had been discharged is inconsistent with his other testimony that the list was described to the International Union as a tentative list.

During the first week of April 1988, at a Louisville meeting between local union officers and local plant management, Keith LaVoie, the manager of human resources at the Jay plant, gave Local 14 President William Meserve a document titled ''Strike Misconduct: Androscoggin'' and listing employees under three headings: ''Discharge for Strike Misconduct,'' ''Discipline for Strike Misconduct,'' and ''Under Investigation.'' Chicoine, Flagg, Hamlin, and Storer were among those listed in the discharge category. Bilodeau was listed in the ''Discipline'' group. Meserve credibly recalls LaVoie saying Respondent was proposing or contemplating discharges and some discipline. At a later meeting between the Local Union and LaVoie on October 18, 1988, LaVoie gave the Union another ''Strike Misconduct'' list dated October 18, 1988, and bearing the same headings. Once again Chicoine, Flagg, Hamlin, and Storer were on the discharge list. Bilodeau was named under the discipline heading with a parenthetical ''under investigation for discharge'' after his name. LaVoie says he probably told the Union this was a list of employees ''subject to discipline for strike misconduct.'' The minutes of that meeting reflect that LaVoie told the union representatives, ''We will give you a list of those who at this time are subject to strike misconduct. Those subject to discipline are still under investigation and may be discharged later. Those under discharge, the investigation has already been done.'' Union spokesman Gary Cook asked LaVoie to provide the specific charges against those employees on the discharge and discipline list. LaVoie, on or about November 1, 1988, gave the Local Union a document headed ''*Striking Employees Subject to Discharge''* and listing 10 employees including Chicoine, Flagg, Hamlin, and Storer, but not Bilodeau, together with the incidents which, according to LaVoie, were all the incidents they had been involved in up to November 1, 1988.

In addition to the question concerning when the decision to discharge was made, two other issues are raised by the various documents and statements issued by Respondent to the Unions. The first is whether notice to the Unions of contemplated, proposed, or actual discharge is sufficient notice to the affected employees. That issue must be resolved in the affirmative for, as held in *Woodlawn Hospital*, 274 NLRB 796 at 796 (1985), ''Where . . . a union, during a strike situation, receives notice, as an outgrowth of its collective-bargaining function, that the employer has discharged strikers represented by the union that knowledge must be imputed to the striking employees.'' Here the Unions were clearly diligently representing the striking employees in the execution of collective-bargaining functions. I therefore conclude the notice to the Unions is imputable to the strikers. The question remains as to whether Respondent's various proffers of lists and explanatory statements constituted notice that a final and unequivocal decision to discharge those listed had been made.[4] The Board has also recently held in *Howard Electrical & Mechanical*,[5] that notice of intent is insufficient to ''trigger the 10(b) period with respect to the unlawful act itself.'' In brief, the Respondent here must show that it not only made a final decision to discharge, but had also notified the employees, in this case their agent the Union, clearly and unequivocally that it had done so. Noting that the incidents cited in the November 1, 1988 list as reasons for discharging Chicoine, Flagg, Hamlin, and Storer include one postdating the Louisville meetings, the May 7, 1988 altercation between Chicoine and security guard Maanao, and further noting LaVoie's testimony that the employees on that list were discharged for all the incidents they had been involved in up to November 1, 1988, I find this sufficient reason to question whether Respondent had indeed made a final unequivocal decision to discharge the four in April 1988. LaVoie's testimony that all of their conduct prior to November 1, 1988 was considered is consistent with his statement to Meserve in April 1988 indicating that Respondent was only proposing or contemplating discharge at that time, and with Gilliland's initial testimony that the list he gave to the Union on April 2, 1988, was ''tentative,'' all of which casts doubt on Respondent's claim of a final decision in April 1988. Further evidence of LaVoie's penchant for ambiguity is found in his October 18, 1988 characterization of the list of that date as one listing employees ''subject to discipline for strike misconduct'' and the heading of the November 1, 1988 list reading ''Striking Employees Subject to Discharge.'' Although it may well be that Respondent made a final discharge decision by April 1988 on Chicoine, Flagg, Hamlin, and Storer, the above-cited statements of LaVoie and Gilliland, the listing of a post-April 1988 offense as a reason for Chicoine's termination, and the ''subject to discharge'' language on the November 1 list persuade me the evidence does not preponder-

[4] See, e.g., *Manitowoc*, supra; *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881–882 (1985); *Oregon Steel Mills*, supra; *Carter-Glogau Laboratories*, 280 NLRB 447 (1986); *Strick Corp*., 241 NLRB 210 fn. 1 (1979); *Postal Service Marina Center*, supra.

[5] 293 NLRB 472 (1989).

ate in favor of a finding of April 1988 finality, nor will it support a conclusion the Union or the employees were given unequivocal notice such a final decision was made in April 1988, and Section 10(b) of the Act does not bar consideration of the legality of the discharges of Chicoine, Flagg, Hamlin, or Storer.

C. *Misconduct*

The refusal of Respondent to employ the five alleged discriminatees after an unconditional offer to return to work was tendered Respondent on behalf of all strikers constitutes a prima facie violation of Section 8(a)(3) and (1) of the Act.[6] Respondent must then come forward with evidence showing it had a good-faith belief these employees had engaged in picket line misconduct sufficient to warrant termination. If Respondent is successful in this effort, the General Counsel may yet prevail by proving the alleged misconduct did not in fact take place.[7] Accordingly, Respondent's good-faith belief and the General Counsel's evidence the misconduct attributed to the five discharged employees did not occur must be gauged in each case.

Before proceeding with an examination of the evidence concerning the conduct of the five employees, I find it necessary to deal with Respondent's contention that the criminal convictions of Hamlin and Storer in the Maine courts are determinative in this proceeding and that I am precluded from deciding whether or not they engaged in the conduct attributed to them by Respondent. This contention is without merit.[8] I therefore now proceed to a determination of each employees situation. I shall limit my examination of their alleged misconduct to those incidents mentioned in the November 1, 1988 list presented to the Union. By anyone's reckoning all five had been effectively discharged by that time and Respondent may not later supplement the list to support its cause.[9]

1. Arthur Storer

Respondent contends it discharged Storer because he threw a rock at, kicked, and jumped on Susan Gemme's[10] car as she was driving home from work on August 6, 1987. Gemme testified that, as she was driving away from the mill on Crash Road, Storer threw a rock at her car, kicked it on both sides, screamed and swore at her, and then jumped on the trunk of her car. She says she then returned to the mill, reported the incident to the security force, and then went to the Jay police station where she reported it to a police officer, Jeffrey Fournier, who took her back to the picketing group where she identified Storer. She pressed charges against him, and testified in the subsequent criminal proceeding on February 4, 1988, in the Franklin County District Court where he was convicted of criminal mischief, jailed, fined, and ordered to make restitution. He withdrew his appeal of this decision, but the Maine Supreme Judicial Court held in its December 13, 1988 decision involving an appeal by Storer, union member Farrington, and the Unions from a lower court finding of civil contempt that there was insufficient evidence to show it was Storer who jumped on and struck a vehicle on August 6, 1987.

Storer denies the conduct attributed to him by Gemme. He first testified that he saw Gene Allen Jr. jump on a car, but then, on cross-examination, he inconsistently testified that he only saw Allen run up and kick the quarter panel of a car, did not see him do anything else to the car, and did not see Allen jump on the car. Storer did not tell Officer Fournier on August 6, 1987, that Allen was the guilty party.

Allen testified it was he, a temporary employee with no recall rights, who threw a rock at, kicked, and jumped on the bumper of Gemme's car. He explains that he did not come forward until after Storer was convicted and after the strike ended because he had hoped the matter would blow over. When he did come forward he gave a statement to Officer Fournier wherein he said he did not jump on the car. He explains he so said because he had jumped on the bumper, not the car. When asked by the undersigned to describe what he did when he jumped on the bumper, Allen testified he ran at Gemme and ''just jumped on the car.'' His explanation concerning why he denied jumping on the car when the police officer questioned him did not ring true when I heard it or now that I have read it in the record, is inconsistent with his own testimony that he ''just jumped on the car,'' and is not credited.

According to Olin McDonald, he was picketing with Storer and others on the evening of August 6, 1987, when he saw Allen kick a car and jump on it. He denies seeing Storer so conduct himself. McDonald is the only witness who claims, contrary to Gemme's credible testimony, that the car was kicked on its way from the plant premises and then jumped on after Gemme turned the car around and proceeded back toward the plant premises. McDonald concedes that while testifying at the state court proceeding he only mentioned that Allen kicked the car and did not mention Allen jumped on the car. There are several unexplained inconsistencies between his state court testimony and his testimony in this proceeding.

Gemme was the most impressive and believable witness of the four testifying on this subject. In addition to Gemme's superior testimonial demeanor, the internal inconsistencies in the testimony of Storer and Allen, the inconsistency between the testimony of McDonald at the state proceeding and before me, the certainty of Gemme that Storer was the assailant, the absence of any reason for Gemme to fabricate, the fact that Allen who seeks to exculpate Storer has apparently been charged with no crime and, as a temporary employee, has no reinstatement rights to surrender by virtue of misconduct, persuade me that Gemme's account should be credited, and it is.

Counsel for the General Counsel concedes and I agree Respondent had a good-faith belief of misconduct by Storer because he was named in a Board complaint[11] as one involved in picket line misconduct and his conviction further supports that belief. The General Counsel has not carried his burden of establishing that Storer did not engage in the conduct for which he was discharged, i.e., the attacks on Gemme's car,

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[6] *SKS Die Casting & Machining*, 294 NLRB 372 (1989).

[7] *Franzia Bros. Winery*, 290 NLRB 927, 931 (1988).

[8] *Jacques Syl Knitwear*, 247 NLRB 1525, 1533 (1980), and cases cited therein.

[9] *Champ Corp*., 291 NLRB 803, 806 (1988).

[10] Gemme has since married and her married name is Lemoine.

[11] The Board's Acting Regional Director for Region 1 issued a complaint against the Unions on December 28, 1987, alleging, inter alia, picket line misconduct by Storer and Chicoine.

and I have concluded Storer did in fact engage in such conduct and such conduct had a reasonable tendency to intimidate and coerce nonstrikers in the exercise of their right not to strike.

2. Thomas Hamlin

Respondent relies on Hamlin's driving on the evening of August 7, 1987, as reason for his discharge. On that evening he,[12] a striker, harassed striker replacements Mary Ann Voter, Gordon Davenport, Charles Smith, and Clifford Smith, who were on their way home from work, by following their car dangerously close with his red pickup truck, driving and weaving his car alongside them on both left and right so closely as almost to bump their vehicle and thereby placing them in danger of being forced off the road or into oncoming traffic, and, after passing them, driving at a speed designed to assure only a small separation between the two vehicles thus creating a danger of collision. Gordon Davenport credibly testified that, just before Hamlin commenced this seemingly cat and mouse game, he saw two men get into the pickup and, as they got in, one shook his fist and stuck his middle finger up at Davenport and companions as they drove by.

Phil Haines, an area supervisor for Respondent, was in another car behind Voter and the other three replacements when the red pickup came up behind him very closely and then attempted to pass on the right side. Haines then observed the red pickup attempting to force Voter's car off the road for several miles.

Thomas Erle, an engineer employed by Respondent, was traveling in another vehicle on the same road at the same time on August 7, 1987, and filed an incident report with Respondent concerning what he observed regarding the red pickup and his occupants on that evening. The parties stipulated that Erle, who did not testify, would, if called as a witness, testify to the events as recited in the incident report. Erle reported two men came up behind his vehicle in a red pickup truck and followed him very closely for a time before pulling alongside him, intentionally backfiring their engine several times, and then again fell back and followed him closely before resuming the alongside position while backfiring the truck's engine and weaving to within a foot of his vehicle several times. Finally, they passed him, stopped the pickup in the traffic lane, got out of the truck and walked toward him (he had stopped 20 yards behind them) gesturing for him to get out of the truck. When Erle put his truck in reverse, the two men got back in the red pickup and pulled off to the side of the road, still gesturing at Erle, Erle then drove past them. Whereupon they again followed him closely and again came alongside him closely on both the left and right. Finally, after stopping briefly and gesturing for Erle to pull over, the driver pulled a U-turn, drove directly at Erle, swerved hard to avoid a collision and left the scene.

Hamlin was charged and pled guilty to a criminal charge of driving to endanger. I agree with the General Counsel that there is no question Hamlin drove in such a manner as to endanger nonstriking employees. I do not, however, agree with the General Counsel that Hamlin's conduct was not strike related. The fact that Hamlin claims he drank 25 to 30 cans of beer and smoked numerous marijuana cigarettes that day certainly may have been a determinative factor in his conduct on August 7, 1987, but it neither excuses that conduct nor makes it merely intoxicated behavior rather than deliberate strike misconduct. A person is responsible for the foreseeable consequences of his acts, and whether or not Hamlin was so intoxicated or drugged that he knew not what he did is conjecture at odds with the evidence. First, Hamlin's harassing conduct[13] seems to have been directed only at replacement employees and other nonstriking, apparently supervisory, employees of Respondent. The gestures testified to by Davenport were, I conclude, directed at the replacements because they were replacements. There is no evidence the fist and the finger were given to the replacements for any other reason. Moreover, the driving of Hamlin testified to by Voter, Davenport, Haines, and Erle was not aimless meandering, but had a design. I am convinced all the dangerous back and front and side-to-side movement of Hamlin with respect to the car containing Voter and others was planned. If in fact Hamlin was merely trying to pass that car, he would not have resumed his antics after he had once passed. Furthermore, there appears to have been no reason for him to even be travelling in the same direction as the others inasmuch as he turned around and returned the way he came when he completed his maneuverings around the Voter car and also when he finished harassing Erle. The repeated efforts to draw Erle from his vehicle also bespeak purposeful rather than haphazard conduct. All this really boils down to is an evening of hazardous driving designed by a striking employee to intimidate replacement employees and other of Respondent's personnel. The fact he had spent the day indulging himself with beer and marijuana does not, by itself, show he was not responsible for his acts. The deliberate pattern of his conduct says otherwise. Contrary to the Charging Unions' contention that Hamlin had not the mens rea necessary to show his conduct was strike related, I conclude he not only had a wrongful purpose in mind, i.e., harassing nonstrikers and management agents, it was a deliberate purpose which he proceeded to put in action. Hamlin's conduct clearly ''exceed[ed] the bounds of peaceful and reasoned conduct'' and had a reasonable tendency to coerce and intimidate Voter, Davenport, and the two Smiths, all striker replacements, in the exercise of their Section 7 right to refrain from engaging in protected activity.[14] Respondent had a good-faith belief Hamlin engaged in the above misconduct, and the General Counsel has not demonstrated Hamlin did not engage in said misconduct.

3. Lawrence Bilodeau

Respondent contends it discharged Bilodeau because of his conduct at the home of David and Brenda Bracy concluding with direct verbal threats on October 28, 1987. Bilodeau lives near the Bracys, about 300 yards by his estimate. On October 28, 1987, he drove by the Bracy house at about 4:30 p.m. The Bracys were in their front yard with their children saying their goodbyes to guests. Bilodeau turned into the drive next door to the Bracy home, turned around, drove to the edge of Bracy's driveway, stopped his truck, got out, and made certain remarks.

[12] Hamlin was accompanied by an unidentified man.

[13] No one questions that Hamlin was the driver and his guilty plea establishes that he was.

[14] *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984).

According to Bilodeau, he asked if Bracy was happy living with all the people he stole a job from, said Bracy was a pretty low character and similar things, and asked if Bracy's children were proud of him. Bilodeau denies saying ''You're not going to live here long.''

According to the Bracys, Bilodeau told Bracy to go ahead and take his truck license number, and then addressed his remarks to Bracy. Bilodeau told Bracy that he had lived there and worked for Respondent for 20 years and he would be damned if Bracy would be living there much longer. Bilodeau called Bracy a ''motherf—er'' and gave Bracy ''the finger,'' and ''the fist.'' He then drove away. Barry denies that Bilodeau either asked if Bracy's children were proud of him or asked if Bracy was happy living with the people he stole the jobs from. I credit the Bracys whose version was the more believable, and who seemed to be honestly testifying as best they recalled. Bracy also credibly testified that Bilodeau would frequently drive by her home, which is not unusual given the nearness of his home just around the corner, but would drive slowly when she and her four daughters, aged 4 to 10, were out, and point at the children one by one which frightened them. Bilodeau denies talking to the children, but not pointing at them. This pointing is not claimed to be a reason for Bilodeau's discharge. Bilodeau's statement that Bracy would not be living there long is, standing alone, ambiguous. Ambiguities may be construed against the one who utters them, and often take on color from surrounding circumstances. In this case the obvious anger conveyed by Bilodeau's statement he would be damned if Bracy remained there, the epithet with which he described Bracy, the raising of his fist, and the obscene finger gesture all tend to lend a threatening overtone to Bilodeau's assurance to the Bracys that they would not be living there very long. Whether Bilodeau's prediction warranted his dismissal is, in my view, a close question, but I am persuaded a finding that it did is required because his statement, in the circumstances, was not a ''nonthreatening expression of opinion'' found permissible in *Clear Pine Mouldings*.[15] Accordingly, I conclude and find Respondent had a good-faith belief Bilodeau engaged in unprotected conduct, and the General Counsel has not proved the conduct did not occur.

4. Forest Flagg

Respondent discharged Flagg for his conduct toward replacement Mark Roderick on December 8, 1987. According to Roderick, as he drove in through the main gate at about 10:15 p.m. on that date he was surrounded by pickets, one of whom, Forrest Flagg, pounded on his window causing Roderick to stop his car, whereupon Flagg opened the passenger side door, reached in and tried to grab Roderick, and said ''I'll kill you, you bastard.'' Roderick immediately drove off with the door still slightly open. He immediately went to the security guard and pointed out Flagg as his assailant. He filed an incident report relating his version of what had taken place.

Flagg agrees he was on the picket line at the time in question, but denies the conduct attributed to him by Roderick. Flagg concedes he would have been picketing on the passenger side of cars passing in. He states he saw no car doors of people driving in being opened that night.

A security video tape of the incident was placed in evidence by Respondent. It does not appear from the video tape, which has no sound, that the person who banged on the car is the same one who opened the door and leaned in. Roderick's definite testimony that he saw Flagg's face as Flagg leaned into the car is credited, but his identification of Flagg as the one who pounded on his window is suspect and, I believe, the result of an assumption that the window pounder was the same person whose face Roderick later saw when the man leaned into his car. Apart from the identification of Flagg as the window pounder Roderick's straightforward, detailed and believable testimony is credited over Flagg's bare denials. The opening of the car door and the leaning in consumed several seconds, ample time for Roderick to get a good look at the intruder in his small car.

The December 8 incident report and the video tape were sufficient to cause Respondent to reasonably and honestly believe Flagg engaged in conduct attributed to him by Roderick. The General Counsel has not carried his burden of showing Flagg did not engage in the conduct other than the window pounding. The remaining misconduct, particularly the unprovoked threat to kill, would be sufficient to disqualify Flagg from employment by Respondent.[16]

5. Lawrence Chicoine Sr.

Respondent enumerated the following reasons for discharging Chicoine in its November 1, 1988 submission to the Union naming those ''subject to discharge.'' The parties agree that the decision to discharge was made by then, and I have concluded these are the reasons Respondent chose to rely on and are therefore the ones to be evaluated.

1. June 29, 1987—''Told Joanne Cummings she would die for crossing the picket line.''
2. July 1, 1987—''Threatened workers from picket line that he had a .44 and would blow their heads off.''
3. December 1, 1987—''Threatened to burn Murray Hall.''
4. March 2, 1988—''Pointed at Dennis Ayala's right front tire as Ayala went through the wood gate. The tire went flat that night.''
5. May 7, 1988—''Charged Security Guard Joe Maanao, raised a bullhorn as if to strike him, and ran into Maanao's raised foot.''

There is no probative evidence to support item 3 which would not be a threat to employees in any event. Item 4 alleges no misconduct by Chicoine. A mere pointing clearly does not disqualify him from employment, and there is no proof he was in any way responsible for the flat tire.

Item 1

Joann Cummings Toothaker, a 14-year employee who was the first striker to return to work, certainly, believably, and credibly testified that the first day she returned to work, at about 5:30 a.m. on June 29, 1987, Chicoine was present as she entered the main gate. She was looking directly at him when he said she was going to die and, ''I'll blow your head off.'' Chicoine's denials are not credited. He was not generally an impressive or particularly believable witness, and

[15] 268 NLRB at 1047.

[16] *Clear Pine Mouldings*, supra at 1047.

his testimony that he believes LaVoie caused all the witnesses' testimony to be manufactured because Chicoine used a bullhorn to publicly declare ''Casey LaVoie, I know who you're f—g and you think I don't'' is also rejected.

Item 2

John Tiegen, a coordinator for the security force provided by the Wackenhut Corporation, was present at the main gate of the Jay facility on July 1, 1987, when Chicoine used a megaphone to tell entering and leaving workers that he (Chicoine) had a .44, if they came back he would blow their head off, scabs were thieves, ''we'' shoot scabs, and ''We know where you live and we'll prove it tonight.'' With the exception of the last quoted statement, Tiegen recited the threats of Chicoine in an April 5, 1988 affidavit. Tiegen had no discernible reason to fabricate testimony against Chicoine and is credited over Chicoine's denial.

Item 5

After several viewings of the video tape of the incident furnished by the General Counsel, examination and reexamination of the testimony and written documents by Chicoine and Wackenhut security officers Joe Maanao and John O'Neill, and consideration of the well-argued briefs of all parties as they relate to this incident, I am persuaded that the video tape is consistent with the testimony of Maanao and O'Neill who have no discernable interest in the outcome of this proceeding or other reason to prevaricate. Their testimony, which is complementary, is credited over that of Chicoine where variances occur, and, combined with the credible portions of Chicoine's testimony, show the following sequence of events.

City police were stationed near the facility's main gate. Maanao left the guard shack where Wackenhut officers were stationed and went to consult with the police officers stationed at the main gate (Chief of Police Parker was present) concerning an automobile that was on fire in the parking lot. As Maanao turned to go back to the guard shack he heard someone calling him names. Chicoine concedes he shouted at Maanao to get back on his own side because Maanao was in an area Chicoine considered reserved for the picket line. Chicoine then ran toward Maanao with the bullhorn in what Maanao and O'Neill characterize as a striking position. Maanao turned toward Chicoine and raised his left leg in a defensive gesture and it came in contact with Chicoine's chest. Maanao maintains Chicoine ran into his leg. Chicoine says Maanao kicked him. I conclude that Chicoine ran into Maanao's unexpectedly extended left leg. I do not believe it likely that Chicoine was preparing to strike Maanao with the bullhorn in the presence of the chief of police, but Maanao, without the benefit of time to contemplate the situation, may well have thought Chicoine was so intending, and a conclusion that he did so intend would not be totally unreasonable in the circumstances. It is fair to say that Respondent honestly believed from the guards' reports, preceding misconduct by Chicoine, and the fact that the Board's Regional Director had issued a complaint alleging Chicoine was guilty of misconduct violative of the National Labor Relations Act, that Chicoine deliberately attacked Maanao, but I do not believe he did. Comparing his physical stature and apparent fitness with that of Maanao, a trained security officer, makes it difficult to conclude Chicoine would deliberately seek to provoke Maanao into a physical confrontation. What happened here was misadventure. Chicoine ran up, bullhorn in hand. Maanao thought he was being attacked, set himself in a defensive posture and reacted by raising his leg to the level of Chicoine's chest where it came to rest. Running into Maanao's foot is not the sort of thing one would reasonably consider intimidating or coercive behavior by the runner, but the running toward Maanao with a bullhorn in a manner which might reasonably indicate to observers, as it did to O'Neill, that Chicoine was prepared to strike Maanao with the bullhorn, and, regardless of whether that was Chicoine's intent, would reasonably tend to coerce and intimidate nonstrikers in the exercise of their Section 7 right to continue working.

Chicoine's threats to Cummings-Toothaker and the threats Chicoine uttered to nonstrikers on the bullhorn on July 1, 1987, are extremely serious statements warranting denial of reemployment of Chicoine because, objectively viewed, they are nothing less than death threats ''inherently coercive and intimidating with respect to the exercise of employees' Section 7 right to refrain from engaging in protected activities.[17] Chicoine's May 7, 1988 conduct was not as serious as his threats to blow people away and accompanying comments, but, when viewed in context and combination with his other misconduct, it was intimidating enough to warrant his termination.

The General Counsel and the Charging Party urge that any misconduct by these five employees (1) was condoned and (2) did not warrant their discharge because nonstrikers engaging in just as serious or more serious misconduct were not discharged.

D. *Condonation*

Condonation is present when clear and convincing evidence shows the employer has agreed to forgive the misconduct, to ''wipe the slate clean,'' and to resume or continue the employment relationship as though no misconduct had occurred, but condonation is not to be lightly inferred.[18] The claim of condonation arises because Respondent directed letters to all strikers, including the alleged discriminatees, on or about February 1, March 24, and September 23, 1988. These letters read, in relevant part, as follows:

February 1, 1988

> As you are by now undoubtedly aware, permanent replacements have been hired to fill all available jobs at the Androscoggin Mill. It has come to our attention that some striking employees thought that they would receive a letter from the Company stating that they had been permanently replaced. It is important to understand that it is not necessary for the Company to notify each individual striking employee that he or she has been replaced.
>
> On June 22, 1987, we wrote a letter to all employees in which we stated our plans to hire permanent replacements. In that letter we explained the rights of striking

[17] *Clear Pine Mouldings*, supra at 1047.

[18] *White Oak Coal Co*., 295 NLRB 567 (1989); *General Electric Co*., 292 NLRB 843 (1989); *United Parcel Service*, 301 NLRB 1142 (1991).

employees to return to work prior to being replaced and the conditions under which they could return to work once they were replaced. Now that permanent replacements have been hired to fill all jobs, you may return to work if a job becomes available for which you are qualified. However, we only anticipate a limited number of openings per month based on current normal turnover.

. . . .

NEWLAND A. LESKO
MILL MANAGER

March 24, 1988

Under the National Labor Relations Act, unreinstated strikers have certain rights. After the strike, you have the right to be recalled to vacancies for which you are qualified. Also, during the strike you have the right to fill job vacancies, like those for which we are now hiring, as they become available. We recognize that this is a personal choice that each of you must make. If you are interested in one of these positions, please contact Human Resources, 897–3431 Ext. 251, as we will begin hiring for these positions in the near future.

. . . .

James B. Thompson
Resident Manager
Androscoggin Mill

September 23, 1988

My purpose in writing is very simple. There has been much confusion and conflicting reports as to how your union leaders view our permanent replacements . . . . I want to make certain there is no misunderstanding between us by your local union leadership, and we have no intention of changing our position on this subject, our replacement workers are permanent.

Even so, it is also my desire to see as many of our striking employees as possible take advantage of openings here at the mill as they occur.

Federal labor law provides the right of economic strikers to retain preferential rights to return to jobs they are qualified to do as those jobs become available. However, economic strikers must offer to return to work before they can be considered for any openings. You have a legal right under the federal labor laws to claim a job as one becomes available. Those desiring to be considered should notify the mill's Human Resources Department.

. . . .

James B. Thompson
Resident Manager
Androscoggin Mill

Mindful of the Board's instruction that condonation is not to be lightly inferred, I conclude these form letters which were sent to about 1250 strikers simply do not constitute clear and convincing evidence that the Respondent had forgiven the strike misconduct for which it repeatedly advised the Unions there might or would be discharges or other discipline. General invitations to offer to return to work, which these letters all preceding the October unconditional offer to return were, do not constitute condonation.[19] I have also considered the fact that Chicoine continued as he had for long before the strike, to serve as the unpaid custodian of Murray Hall, a community hall in Livermore Falls which is owned by Respondent and used primarily for civic meetings and groups, until some time after the events relied on by Respondent for his discharge but before the unconditional offer to return. Respondent's failure to remove him as the custodian, which duties he apparently performed in excellent fashion, does not serve as evidence Respondent had condoned his picket line misconduct. It does however indicate that Respondent had no fear Chicoine would do damage to Murray Hall.

E. *Disparate Treatment*

It is settled that an employer may not employ a double standard when judging the conduct of strikers and nonstrikers, and may not knowingly tolerate nonstriker conduct that is at least as serious or more serious than that of strikers denied employment for misconduct.[20] The burden of proving such a double standard was employed rests on the party claiming that was the case. Here both the General Counsel and the Charging Party allege such disparate treatment. The allegations of such treatment raised will therefore be examined to determine (1) whether the nonstriker conduct occurred and, if it did, was as serious or more serious than that of one or more[21] of the five employees denied employment, (2) whether Respondent was aware of such conduct by nonstrikers, and (3) whether more lenient treatment was meted out to nonstrikers for that conduct.

F. *Conduct of Greg York*

On December 31, 1987, there was sufficient snow on the ground that Chicoine, arriving in his automobile with coffee and donuts for the pickets at about 7 a.m., was required to park his vehicle in the center of the road. Chicoine got out of his vehicle. A small pickup truck emerged from the plant exit gate. Seeing this, Chicoine walked toward the truck shouting expletives at the driver, Greg York. The truck swerved toward Chicoine, who jumped out of the way. It is not clear whether the swerve was intentional or not. Although Jay Police Officer Randall Rose first testified ''he swung the wheel to the left,'' he later explained that what he actually saw was that the truck went past him, Chicoine was yelling at the driver, the truck swerved to the left toward Chicoine who jumped back, and the truck kept going. He was on the passenger side of the pickup as it passed him, and he was watching Chicoine and the truck simultaneously. Rose radioed ahead to another officer and instructed him to write a summons for driving to endanger. He did so. Rose then wrote a report stating York ''apparently intentionally'' tried to hit Chicoine. Respondent objected to the receipt of Rose's testimony on the ground it had no notice he had proffered or would proffer evidence on this incident. I overruled

[19] *American Tool Works Co.*, 116 NLRB 1681, 1717 (1956).

[20] *Chesapeake Plywood*, 294 NLRB 201 (1989); *Champ Corp.*, 291 NLRB 803, 806 (1988); *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988).

[21] A one-on-one comparison between the conduct of strikers and nonstrikers and Respondent's reaction thereto is appropriate. *Chesapeake Plywood*, supra.

the objection because his testimony is relevant, but I agree with Respondent that it has not been proved that Respondent knew of Rose's evidence prior to the hearing before me.

York did not testify. Glen Zalkin, plant personnel supervisor at the time who took part in the investigation of strike misconduct, testified that when Respondent received notice of the incident, several months after it happened, James Erwin, Respondent's attorney, reported to Zalkin that he interviewed York, but York did not recall the incident and had not heard about it until he was served with ''papers'' two months later. The papers referred to were most probably summons to appear on the driving to endanger charge. That charge was subsequently ''filed,'' i.e., placed in suspense pending repetition of said conduct. Erwin testified on other matters, but did not speak to his interview of York.

The failure of Erwin or York to testify on this matter leaves the testimony of Chicoine, to the extent he is corroborated by Rose, and Rose as the only nonhearsay testimony concerning what really happened. As previously noted, Chicoine did not impress me as an entirely truthful witness, and his general picket line conduct was strident, replete with objectionable name calling, obscene language, and serious threats. I further note that because Chicoine had to park his vehicle in the center of the street because of the snow, it may be that York's driving was also affected by the snow. Nevertheless, the fact remains that the only probative evidence of record on the incident is the testimony of Chicoine and Rose which, viewed together, establishes that the driving of York, whether intentional or not, did appear to Chicoine and Rose to be a deliberate effort to hit or, at the very least, frighten Chicoine. The creation of such an appearance, otherwise unexplained, would reasonably tend, I believe, to intimidate other strikers as well as Chicoine. York was not disciplined.

G. *Conduct of Andrew Barclay*

The only direct evidence concerning the conduct of Barclay on July 30, 1987, is the testimony of Charles Fullerton, a striker. Neither Barclay, his son, nor the other 9 or 10 strikers present testified. The testimony of Glen Zalkin reporting what Barclay told him happened is hearsay, and was heard over the objection of the Charging Party when Respondent's counsel explained this testimony was only being offered to show what the Respondent knew of the incident and why it acted as it did. According to Fullerton, who modified his testimony on cross-examination, he was attending a party at a camp owned by John Luciano, another striker, on Brenton Pond in Livermore, Maine, about 10 miles from the Jay plant when Andrew Barclay, who had gone on strike but then returned to work, and his son arrived at the party carrying baseball bats. There were about 10 strikers still at the party when the Barclays drove up. Barclay was riled up when he arrived on the scene. Fullerton recalls Barclay complained about being called a scab, and further recalls (1) he had heard Barclay had complained of a window being broken at his camp that day, and (2) a large number of boats had pulled up in front of Barclay's house, which is also located on the pond, a few days before July 30.[22] When Barclay and son arrived, Luciano told Barclay not to trespass, to stay away, and he was not welcome. Barclay said he was there to clean them all out. He and his son approached with their bats. The strikers at the party asked them to drop the bats and leave. They did not comply. A struggle ensued with strikers attempting to relieve Barclay of his bat. During the struggle the bat struck Fullerton at the bridge of his nose necessitating medical attention and the use of stitches to hold the skin together. As a result, a criminal complaint was filed against Andrew Barclay for recklessly causing bodily injury or offensive physical contact to Fullerton. On January 24, 1989, pursuant to motion to file presented by the assistant district attorney of the State of Maine, the Superior Court ''filed''[23] the case on payment of $50 court costs and $50 restitution to Fullerton.

As soon as Respondent learned of the incident, Zalkin and one of Respondent's lawyers interviewed Barclay. His explanation was consistent with Fullerton's testimony described above, with the addition that he told Zalkin he had been harassed at his home by strikers calling him a scab and other names, blowing air horns at night, and throwing something through his window resulting in his son being covered with shattered glass. Barclay told Zalkin he only went to Luciano's camp to accompany his son who insisted on confronting the strikers. They took the bats along for protection. After hearing this explanation, Zalkin told Barclay that if he was convicted on the criminal complaint his discharge would be considered and, regardless of the outcome of the complaint, a repetition of the conduct would cause his discharge to be considered. No further discipline was meted out to Barclay.

It is unlikely that the two Barclays would go to Luciano's camp with the intention of attacking the strikers, but the fact they did go with weapons in hand, for protection or otherwise, was a provocation. As Fullerton recalls, Barclay was angry and this was apparent. Combine this with Barclay's statement he was there to clean them out and the bat in his hand and it would be surprising if the strikers were not apprehensive when they sought to wrest the bat away. The fact the odds against the Barclays were about 10 to 2 does not obscure the obvious that the appearance of two men, at least one obviously angry with the Luciano group and issuing a threat, armed with baseball bats, and rejecting Luciano's request to leave is enough to cause a reasonable man to anticipate attack. Moreover, Fullerton's injury was a direct result of the unfortunate decision to confront the strikers while so armed. Angry men carrying bats as weapons and initiating a confrontation plainly create a threatening situation[24] fraught with danger and reasonably tending to coerce and intimidate those whom they confront. That Barclay may have considered he needed the bat for self-defense is irrelevant.[25]

H. *Conduct of Brian Trudeau*

Trudeau did not testify. Richard Bates did. The account of their confrontation on May 27, 1988, is therefore gleaned from the testimony of striker Bates and the content of an in-

[22] Fullerton's recollection seemed to be reluctant and very selective regarding alleged harassment of Barclay prior to his visit to Luciano's camp.

[23] Respondent, correctly, I believe, characterized ''filing'' as a conditional dismissal.

[24] Here, as in *Chesapeake Plywood*, supra at fn. 10, the exhibition of a weapon was an essential part of the threatening behavior.

[25] *Southwest Forest Industries*, 273 NLRB 765, 766 fn. 6 (1984).

cident report he completed on May 27, 1988, and says is correct. The incident started with nonstriker Trudeau following Bates as they drove across the bridge between Auburn and Lewiston, Maine, about 30 miles from Jay. Trudeau called Bates names and gave him the finger. When Bates drove in and parked at Shaws' store in the Auburn Shopping Mall, Trudeau stopped his vehicle across the back of Bates' parking space, and continued to use abusive language toward Bates for a few seconds. Trudeau then drove into a parking spot near the store. Bates then got out of his car, screamed at Trudeau, called him scum, asked, ''What's the matter, being a scab starting to get to you, really bothers you, huh?'' Then, while still walking to the store, which required him to pass Trudeau who was sitting in his car, Bates invited Trudeau to ''come on, come and get me.'' Trudeau got out of his vehicle, called Bates some names, and said ''I'll kill you, you son of a bitch,'' and got back in his car. That ended the exchange. Bates continued into the store, had an employee call the police, and filed a complaint. There was no prosecution.

What we have here is an escalating exchange of insults between striker and nonstriker in which the latter, Trudeau, finally replied to Bates' challenge with, ''I'll kill you, you son of bitch,'' but made no effort to attack, advance on, or otherwise menace Bates after uttering the threat. Trudeau's threat was not a calculated, unprovoked threat like those death threats expressed by Flagg and Chicoine. In context with the rest of the exchange between Trudeau and Bates, Trudeau's threat in response to Bates' challenge was delivered in the heat of the moment and, although beyond the bounds of lawful conduct, falls within the category of provoked statements which do not constitute misconduct sufficient to warrant denying an employee his or her employment.[26] It was not likely to intimidate Bates, who had turned into the aggressor in the exchange of words, in the exercise of Section 7 rights, and no other employee of Respondent was present.

I. *Conduct of Mark McKenna*

Kevin Nasatowicz, a striker, testified on direct examination that when he and his girlfriend pulled into a filling station in Rumford, Maine, in the summer of 1988, McKenna, a replacement employee, was on the other side of the gas pumps, apparently as a customer. Then McKenna asked Nasatowicz, ''what's the matter, you got nothing to say to me today?,'' which elicited ''No, I have nothing to say to you, scab.'' McKenna asked what he said. Nasatowicz repeated his statement, to which McKenna replied, as he started his car to leave, ''If I ever get you alone, I'm going to rip your head off.''

On cross-examination, Nasatowicz amended his testimony to reflect he had called McKenna a ''f—g scab'' on the picket line, might have also done so at a fishing derby, and it is possible that upon their meeting at the filling station in Rumford the first thing McKenna asked was whether Nasatowicz wanted to call him that name again, to which Nasatowicz possibly may have responded by apologizing.

According to Zalkin, Erwin investigated the incident and reported McKenna's version which was essentially like that Nasatowicz relates on cross-examination as what possibly happened. Respondent took no action against McKenna.

Notwithstanding the fact that Respondent's evidence concerning McKenna's version is hearsay and therefore entitled to little weight, the testimony of Nasatowicz on direct examination is compromised by his testimony on cross-examination and is not particularly persuasive. Moreover, Nasatowicz' version on direct examination, even if credited, shows that McKenna's alleged threat conditioned on fulfillment of a future circumstance was not accompanied by other menacing behavior, was a spontaneous reaction to Nasatowicz' name calling, did not, objectively viewed, reasonably tend to intimidate Nasatowicz in the exercise of Section 7 rights, and was not misconduct as serious as the misconduct engaged in by any of the five alleged discriminatees.

J. *Knives, Tire Wrench, and Axe*

The General Counsel and Charging Party produced incident reports and police records indicating guards or police officers confiscated knives from replacement employees Scott Christian, Ronald York Jr., Kevin McLean, James Taylor, Billy Leonard, and James Parks, an axe from the vehicle of Ronald Downs, and a tire wrench from the vehicle of Jeffrey Williams. There is no evidence any of these men, except for Christian, had a knife, axe, or tire wrench in their hand, nor is there any evidence any of them, including Christian, threatened or otherwise endangered or menaced anyone with these items. In short, it appears the knives and so forth were simply confiscated by officers as a precautionary measure. There is no evidence to the contrary. The mere possession of these items has not been shown to be and is not found to be misconduct warranting discipline and none was given.

The case of Scott Christian differs from the others because he was observed holding a knife with a piece of meat on it as he drove in. Zalkin testified that no action was taken against Christian because he explained to Zalkin he was eating his lunch, consisting of kielbasa, as he rode through the picket line and used the knife to cut and pick up pieces of the meat as he ate. There is no eyewitness testimony to the incident, and the documentary evidence proffered by the General Counsel and the Charging Party only shows the knife was confiscated because he was holding it with a portion of meat on it as he passed through the picket line, was subsequently charged with ''Dangerous Weapon at Labor Disputes and Strikes'' in the State of Maine District Court, and the case was ''filed'' on Christian's payment of $150 to the Girl Scouts.

The General Counsel's reliance on *Chesapeake Plywood*, 294 NLRB at 203, supra, for the proposition that the mere display of the knives, axe, and tire wrench constituted threats is misplaced. Apart from the fact there is no evidence proffered by the General Counsel, other than in the case of Christian, concerning if or how the alleged weapons were displayed or discovered, *Chesapeake Plywood* dealt with an employee with a shotgun in the seat with him, or on his lap, while he threatened pickets that if they messed with him they would have to answer to ''this,'' a clear reference to the shotgun. The Board held that ''the exhibition of the shotgun was an essential aspect of the threat.'' Supra at fn. 10. It did not hold the display of the shotgun alone was a threat of physical harm. I have also considered the Charging Party's reliance on *Keco Industries, Inc*., 301 NLRB 303 (1991), for

[26] Compare *J. W. Microelectronics Corp*., 259 NLRB 327 (1981), quoted with approval in *Precision Window Mfg*., 303 NLRB 946 (1991).

its contention the ''display'' of weapons by the replacement employees was grounds for discharge. Here again, there is no evidence what if any ''display'' was made. I am of the opinion that ''display'' means something more than mere possession. In *Keco*, a striking employee carried a gun stuck in his waist band while he walked near a gate being used by nonstrikers. The Board held that a gun is an inherently dangerous weapon and the danger was particularly acute when a striker with a gun stands at a place where nonstrikers enter the plant. A knife, an axe, or a tire wrench is a dangerous weapon when used as one, but none are as inherently dangerous as a gun which is specifically designed to be a dangerous weapon. See *Keco*, supra at fn. 7. Moreover, the Board in *Keco* specifically reserved decision as to whether the carrying of a gun would always tend to coerce or intimidate employees. The circumstances determine the answer. The same is true in the instant case, and the circumstances do not warrant a finding the mere possession of the knives, axe, or tire tool was dischargeable misconduct, or that Christian's ''display,'' if it can be called that, was a factor warranting such a finding. Neither the General Counsel nor the Charging Party have carried their burden of showing the possession of the above-described instruments[27] constituted misconduct equal to or greater than that attributed to the alleged discriminatees.

K. *Other Conduct of Scott Christian*

On one occasion Scott Christian spat on a striker. Respondent gave him a verbal warning. This conduct does not rise to the level of the misconduct for which the five discharges were given. It is therefore unnecessary to resolve whether this disagreeable conduct was provoked.

Conclusions on Disparity of Treatment

The conduct of Trudeau and McKenna was not as serious as that of Storer, Hamlin, Bilodeau, Flagg, or Chicoine, nor is the mere possession of the knives, axe, and tire wrench previously discussed. The conduct of Greg York and Andrew Barclay is another matter. York's driving his truck in such a manner as to indicate he might be attempting to hit Chicoine amounts to a perceived threat of personal injury even though his intent has not been proved. Barclay's appearance at Luciano's camp armed with a bat, as was his son, was threatening and provoked a physical confrontation resulting in injury to Fullerton.

Comparing the conduct of Barclay and York with that of Bilodeau, and mindful of the Board's teaching that a threat of physical injury is more serious than a threat to property,[28] I am persuaded that their threatening conduct was at least as serious as that of Bilodeau whose threat, like that of Hockett in *Chesapeake*, was less than explicit. York was not disciplined and Barclay was merely warned, but Bilodeau was discharged. I therefore conclude Respondent violated Section 8(a)(3) and (1) by disparate treatment.

Considering that Hamlin deliberately and without provocation embarked on a course of endangerment which was reasonably calculated to and did put several nonstrikers and managerial personnel at risk of life and limb, and Storer deliberately and without provocation viciously attacked and damaged the car of Gemme while she was in it, thereby terrorizing her, I conclude that neither the inexcusable conduct of York, apparently in response to Chicoine's approaching him and screaming, nor the conduct of Barclay, who had been subject to harassment by strikers and therefore had some provocation, were as serious as that of Storer or Hamlin who were lawfully discharged.

The discharge of Flagg for opening Roderick's car door, attempting to grab him, and threatening to kill him, all without provocation, was more serious than the conduct of York, who was given some provocation by Chicoine, but not that of Barclay who wielded a weapon while threatening violence. Flagg's discharge therefore violated the Act.

Chicoine's threat to blow Toothaker's head off and his use of a megaphone 2 days later to broadcast to entering and leaving workers that he had a gun and would blow their heads off if they returned to work were extremely serious threats widely broadcast. These unprovoked incidents, viewed in context with his penchant for using a bullhorn, accosting people and yelling and cursing at them as shown by his walking toward York's approaching truck and running at Maanao, reasonably tended to intimidate and coerce nonstrikers in both an individual and wholesale manner. It is a close question, but I do not believe the single instances of misconduct by Barclay and York, although serious, were as serious, whether viewed as intimidating, coercive, or just plain unexcusable, as the overall conduct of Chicoine. I therefore conclude he was lawfully discharged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Lawrence Bilodeau and Forrest Flagg under conditions discouraging union membership.

4. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Lawrence Chicoine Sr., Thomas Hamlin, and Arthur Storer.

THE REMEDY

In addition to the usual cease and desist and notice posting-/-requirements, my recommended Order will require Respondent to offer unconditional reinstatement to Lawrence Bilodeau and Forrest Flagg and make them whole for wages lost as a result of their unlawful discharge, said backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent will also be required to remove from its files any reference to these adverse actions and notify Bilodeau and Flagg in writing this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

[27] In fact, we do not know exactly what kinds of knives were involved, whether the ''axe'' was a hatchet, or a single-edged, or double-edged axe, or what kind of a tire wrench we are talking about.

[28] *Chesapeake*, supra at 307.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, International Paper Company, Jay, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union membership or activities by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lawrence Bilodeau and Forrest Flagg immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of wages they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the discharge of Lawrence Bilodeau and Forrest Flagg and notify them in writing this has been done and that evidence of this unlawful action will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their place of business located in Jay, Maine, copies of the attached notice marked ''Appendix.''[30] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''